Supreme Court, U.S.
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No. 90-1953

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

ROBERT T. DARDEN,

Petitioner,

v.

NATIONWIDE MUTUAL INSURANCE COMPANY, NATIONWIDE MUTUAL FIRE INSURANCE COMPANY, and NATIONWIDE LIFE INSURANCE COMPANY,

Respondents.

On Cross-Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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RESPONDENTS' BRIEF IN OPPOSITION TO CROSS-PETITION FOR WRIT OF CERTIORARI

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July 22, 1991

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether an incentive compensation arrangement for insurance agents is an "employee pension benefit plan" for purposes of the Employee Retirement Income Security Act of 1974, as amended?

LIST OF PARTIES PURSUANT TO RULE 29.1

The following statement is provided pursuant to Rule 29.1 of the United States Supreme Court Rules, which requires that this brief include a list of all parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates of the Respondents.

Respondents are members of a group of corporations that includes commonly owned or managed stock and mutual insurance companies, mutual funds, and other companies. Ownership interests in these companies outside the corporate group are limited to the interests of mutual insurance policyholders and mutual fund stockholders. The following list sets forth the Respondents, parent companies of the Respondents, and mutual insurance companies and mutual funds affiliated with the Respondents.

Nationwide Mutual Insurance Company
Nationwide Mutual Fire Insurance Company
Nationwide Life Insurance Company
Nationwide General Insurance Company
Nationwide Property and Casualty Insurance Company
Employers Insurance of Wausau A Mutual Co.
Wausau Country Mutual Insurance Company
NGC County Mutual Insurance Company
Farmland Mutual Insurance Company
NIF/Nationwide Money Market Fund
NIF/Nationwide Bond Fund
Nationwide Investing Foundation Fund
Nationwide Investing Foundation Growth Fund
Nationwide Corporation

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RESPONDENTS' BRIEF IN OPPOSITION TO CROSS-PETITION FOR WRIT OF CERTIORARI

Respondents Nationwide Mutual Insurance Company, Nationwide Mutual Fire Insurance Company and Nationwide Life Insurance Company (collectively, "Nationwide)[1] hereby submit their Brief in Opposition to the

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[1] Pursuant to Rule 29.1 of the Court's Rules, a list setting forth the parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates of the Respondents is included at page (ii) of this brief.

Cross-Petition for Writ of Certiorari filed by Robert T. Darden ("Darden" or "Cross-Petitioner") in the above-named case.

The Cross-Petition presents the question whether a specific incentive compensation arrangement (referred to as "Extended Earnings") provided by Nationwide to certain of its insurance agents, including Darden, is an "employee pension benefit plan" for purposes of Title I of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"). That contractual arrangement includes a term imposing a financial penalty (loss of future payments) in the event a former agent engages in limited competitive activities. Darden sued under ERISA section 1132(a)(1)(B), alleging that the nonforfeiture requirements of ERISA (29 U.S.C. § 1053(a)) prevented enforcement of that provision against him. The court of appeals below properly determined that the incentive compensation arrangement at issue was not an "employee pension benefit plan" and hence was not subject to the ERISA nonforfeiture requirements. There is no conflict among the courts of appeals on this issue, and there is no legal principle or standard at issue that merits this Court's review. Accordingly, this Court should deny the Cross-Petition for Writ of Certiorari.

OPINIONS BELOW

The initial unreported decision of the United States District Court for the Eastern District of North Carolina in this matter was issued on May 23, 1985, and is reprinted in the Appendix filed with Nationwide's Petition for Certiorari in *Nationwide Mutual Insurance Co. v. Darden*, No. 90-1802 (hereinafter referred to as "Appendix" or "App.") at 47a. The decision of the Fourth Circuit vacating and remanding that initial decision is reprinted in the Appendix at 32a and reported at 796 F.2d 701 (1986) ("*Darden I*"). The order of the Fourth Circuit denying rehearing with respect to *Darden I* is

reprinted in the Appendix at 53a. The unreported decision of the District Court on cross motions for summary judgment was issued June 22, 1988 and is reprinted in the Appendix to the Cross-Petition at 50a. The final decision of the District Court on remand is reprinted in the Appendix at 13a and reported at 717 F. Supp. 388 (1989). The second opinion of the Fourth Circuit, dated January 7, 1991, is reprinted in the Appendix at 1a and reported at 922 F.2d 203 (*"Darden II"*). The order of the Fourth Circuit denying rehearing with respect to *Darden II* is reprinted in the Appendix at 51a.

JURISDICTION

The grounds on which the jurisdiction of this Court is invoked are set forth at pages 4-5 of the Cross-Petition.

STATUTES INVOLVED

Section 3(2)(A) of Title I of ERISA, 29 U.S.C. § 1002(2)(A) (1988), provides:

> Except as provided in subparagraph (B), the terms "employee pension benefit plan" and "pension plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund, or program—
>
> > (i) provides retirement income to employees, or (ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond,
>
> regardless of the method of calculating the contributions made to the plan, the method of calculating the benefits under the plan or the method of distributing benefits from the plan.

Subparagraph (B) of this provision authorizes the Secretary of Labor to provide different treatment for cer-

tain types of plans by regulation, and is not relevant to the issue in this case.

STATEMENT OF THE CASE

The case is summarized in Nationwide's Petition in No. 90-1802 at pages 3-6. The following are those facts relevant to the issue raised by the Cross-Petition.

Nationwide is one of the largest insurance groups in the United States. It underwrites risks through a sales force of independent contractor agents. The relationship between Nationwide and the agent is governed by an Agent's Agreement. App. 39a, 49a.

Since 1969, the Agent's Agreement has provided a form of agent compensation presently referred to as the Agent Security Compensation Plan ("ASCP"). The ASCP was designed to provide an incentive to Nationwide agents to increase Nationwide policy sales, and is conditionally payable after termination of the agency with Nationwide. The Agent's Agreement expressly provides that ASCP payments will not be made if a former agent engages in the insurance business, in competition with Nationwide, within one year of the termination of his contract with Nationwide and within a twenty-five mile radius of his Nationwide business location, or in certain other circumstances. App. 3a.

The ASCP consists of two parts—Deferred Compensation Incentive Credits ("DCIC") and Extended Earnings —with distinct purposes, terms and obligations. Under DCIC, an agent is credited with a graduated percentage of his annual original and renewal insurance commissions, from the date he qualifies for the ASCP to the termination of his Nationwide agency. Payments attributable to DCIC may commence after the agent terminates his agency with Nationwide or, if later, the agent reaches age 50. Benefits vest in accordance with a specified schedule based on age and length of service, and

are actuarially reduced for commencement prior to age 60. The agent may defer the commencement of DCIC payments and may choose from among several forms of payment. App. 3a, 9a, 23a-24a.

Under Extended Earnings, Nationwide pays a terminating agent a sum equal to his renewal commissions over the twelve months preceding termination of his Nationwide Agreement. These payments commence sixty days after such termination, subject to an election by the agent to postpone commencement. The agent may choose the form of payment from among specified options, which may differ from that under DCIC. Nationwide makes no advance provision for payment of its Extended Earnings obligations. Nationwide meets its obligation in part by reducing future commissions paid with respect to the policies of the terminating agent that are assigned to another Nationwide agent. App. 3a, 10a-11a; Appendix to Cross-Petition at 52a-54a.

As discussed in Nationwide's Petition, following termination of his agency, Darden engaged in the insurance business in a manner that conflicted with the contractual conditions for ASCP payments. Nationwide notified Darden that, by the terms of the Agent's Agreement, no ASCP compensation would be paid to him. App. 3a-4a. Darden brought an action in federal district court alleging that ERISA precluded the enforcement of the conditions for ASCP payments against him and seeking those payments and other relief.

There is no dispute that Darden violated the relevant terms of the Agent's Agreement. The parties disagree whether ERISA is applicable to that Agreement. Darden contends that the minimum vesting requirement of section 203 of Title I of ERISA, 29 U.S.C. § 1053 (1988), applies and does not permit enforcement of the ASCP conditions. That vesting requirement is applicable by its terms only to "employee pension benefit plans" as defined

in section 3(2) of ERISA, 29 U.S.C. § 1002(2) (1988). Nationwide contends that the Extended Earnings provisions of the Agent's Agreement do not constitute a "pension plan" within the meaning of ERISA.

This issue was first addressed below following the Fourth Circuit's *Darden I* opinion, which remanded the case to the district court. On cross motions for summary judgment, the district court held that Extended Earnings was not a "pension plan," relying on *Fraver v. North Carolina Farm Bureau*, 801 F.2d 675 (4th Cir. 1986), *cert. denied*, 480 U.S. 919 (1987), decided two months after *Darden I*. In *Fraver*, an arrangement for insurance agents nearly identical to Extended Earnings was held not to be a "pension plan." Like the *Fraver* arrangement, Extended Earnings is payable immediately following termination of an agency without any retirement or age requirements, is based solely on renewal commissions over the agent's final twelve months, and is partially recouped from commissions paid to the terminating agent's successor. In *Fraver*, the Fourth Circuit held such an arrangement was in the nature of a final commission or "buy out," not a "pension plan." 801 F.2d at 678. Accordingly, the district court held that Extended Earnings was not a "pension plan." Appendix to Cross-Petition at 53a-55a.

The district court further held that DCIC was severable from Extended Earnings and, after trial, found that DCIC was a "pension plan" subject to ERISA. App. 13a, 23a-24a. After deciding other issues, the district court entered judgment for Darden as to DCIC and for Nationwide as to Extended Earnings.

On appeal, the Fourth Circuit affirmed in *Darden II*. The court of appeals agreed that Extended Earnings was a separate arrangement and was not a "pension plan," under *Fraver*. App. 1a, 10a-12a.

REASONS FOR DENYING THE WRIT

The Cross-Petitioner fails entirely to identify any special or important reason for this Court to review the status of Nationwide's Extended Earnings provisions under ERISA.[2] *See* Supreme Court Rule 10.1. The Fourth Circuit is the only court of appeals that has addressed this issue. The Cross-Petitioner cites a contrary decision by a federal district court, but that decision was reversed on appeal on other grounds. *See Plazzo v. Nationwide Mutual Insurance Co.*, 697 F. Supp. 1437 (N.D. Ohio 1988), *rev'd*, No. 88-4016 slip op. (6th Cir. Dec. 22, 1989) (reprinted in App. at 54a), *cert. denied*, No. 89-1499 (Oct. 29, 1990). There are no conflicting decisions on the question presented by the Cross-Petition that require resolution by this Court.

Further, the Cross-Petition does not raise any question of federal law worthy of this Court's decision. The court of appeals in *Darden* did not articulate a test or standard interpreting the statutory definition of "pension plan" under ERISA. It did not undertake a legal analysis of that definition. Instead, it reviewed the specific facts and concluded that Extended Earnings was not a "pension plan" under its precedent. The Fourth Circuit correctly characterized Extended Earnings; it is a form of compensation provided for in the overall context of the Agreement for the agent's services, payable without regard to the agent's reason for or age at termination, and keyed to his renewal commissions over his final twelve months. These facts are indicative of a final commission or incentive payment, not a pension program.

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[2] Nationwide believes that the courts below erred in holding that DCIC was a "pension plan" subject to ERISA, particularly in the face of uncontradicted expert testimony that DCIC was not a pension program. Nationwide did not, however, raise this issue in its Petition.

Similarly, in each of the limited number of authorities outside the Fourth Circuit considering whether different compensation arrangements were "pension plans" for purposes of ERISA, the analysis has been based on a consideration of the specific and narrow factual setting in question. *See Williams v. Wright*, 927 F.2d 1540, 1543-47 (11th Cir. 1991); *Murphy v. Inexco Oil Co.*, 611 F.2d 570, 575-76 (5th Cir. 1980); *McQueen v. Salida Coca-Cola Bottling Co.*, 652 F. Supp. 1471, 1472-73 (D. Colo. 1987); *Jervis v. Elerding*, 504 F. Supp. 606, 608 (C.D. Cal. 1980); Department of Labor Advisory Opinions 76-79 (May 25, 1976) and 76-110 (Sept. 28, 1976) (copies appended to this brief).

The Cross-Petition simply presents no legal issue suitable for review by this Court. The "pension plan" issue thus differs markedly from the question presented by Nationwide's Petition of the standard for "employee" status under ERISA. While an individual must be an "employee" participating in a "pension plan" for ERISA vesting requirements to apply, these two statutory conditions are legally distinct and analytically independent.[3] The "employee" issue is the subject of a conflict among the courts of appeals and presents important legal issues amenable to resolution by this Court. The "pension plan" issue has turned on an analysis of the particular facts involved, without a legal controversy or conflict that this Court might effectively address. This Court should grant Nationwide's Petition with respect to the "employee" issue, but granting the Cross-Petition is neither necessary to resolution of the "employee" issue nor warranted on its own merits.

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[3] Thus, even though the facts of the cases were substantially similar, the Fourth Circuit was able separately to address the "employee" issue in *Darden I* and the "pension plan" issue in *Fraver*.

CONCLUSION

The Cross-Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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July 22, 1991

APPENDIX

APPENDIX

P/OPINION 76-79 3(2)

May 25, 1976

Dear :

This is in response to your inquiry directed to our Area Office on behalf of and concerning the Employee Retirement Income Security Act of 1974 (ERISA). We regret that we were unable to reply to you earlier.

In 1973, entered into an agreement with his employer, Theatres , Inc., under which he would be paid a pension benefit upon his reaching age 65. was terminated from his employment on January 12, 1976, prior to being vested with any portion of his retirement benefit, and he asks whether or not the ERISA will afford him any relief.

We have concluded that the agreement between and his employer is an employment contract and is not an "employee pension benefit plan" as that term is defined in the Act. Therefore, as the agreement is not subject to the requirements of the ERISA, we are not in a position to advise as to what rights, if any, he might have under such agreement.

We regret our inability to be of service in this instance. We are returning herewith the copy of the agreement that was forwarded to us.

Sincerely,

Mr. M. Jerry Groves [Sep. 28, 1976]
Manager
Peat, Marwick, Mitchell & Co.
Financial Plaza of the Pacific OPINION 76-110
P.O. Box 4150
Honolulu, Hawaii 96813 3(2)

Dear Mr. Groves:

This is in response to your inquiry whether an agreement between Computab, Inc. and Mr. Robert Jones, an employee and 50 percent stockholder, to provide him additional retirement compensation for past services in return for certain considerations, is subject to the provisions of the Employee Retirement Income Security Act of 1974 (ERISA).

You state that Mr. Jones is being bought out and, in addition, an individual contract was made to provide him with supplemental compensation.

Under the circumstances, the agreement is an individual contract with Mr. Jones to render specific personal services and does not constitute an employee pension benefit plan within the contemplation of Section 3(2) of the ERISA.

Sincerely,

James D. Hutchinson
Administrator
of Pension and Welfare
Benefit Programs